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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 323

AMERICAN NATIONAL BANK OF NASHVILLE, TENNESSEE, PETITIONER

v.

CITY OF SANFORD, FLORIDA, AND THE UNITED STATES OF AMERICA (INTERVENOR)

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The order of the District Judge was entered without opinion (R. 153). The opinion of the Circuit Court of Appeals for the Fifth Circuit (R. 164) is reported in 112 F. (2d) 435.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on May 31, 1940 (R. 170). A petition for rehearing (R. 171-184) was denied July 8, 1940 (R. 186). The petition for a writ of cer-

tiorari was filed August 12, 1940. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended, 28 U. S. C. Sec. 347.

QUESTIONS PRESENTED

Over two-thirds of the creditors of a city, prior to the enactment of the Second Municipal Bankruptcy Act, voluntarily accepted refunding bonds in exchange for old bonds, pursuant to a plan submitted by the city. Later, after passage of the Act, the same plan was submitted by the city for confirmation in composition proceedings under Section 83 (j). The questions are:

1. Whether, for the purpose of determining whether sufficient creditors had consented to the filing of the petition and to the confirmation of the plan, the holders of the refunding bonds may be included among the consenting creditors.

2. Whether Section 83 (j), if construed to authorize their inclusion, violates the Fifth Amendment.

STATUTE INVOLVED

Section 83 (j) of the Bankruptcy Act as amended, June 22, 1938, c. 575, Sec. 3 (b), 52 Stat. 940 (11 U. S. C., Supp V, Sec. 403 (j)), provides:

The partial completion or execution of any plan of composition as outlined in any petition filed under the terms of this Act by the exchange of new evidences of indebtedness under the plan for evidences of indebtedness covered by the plan, whether such partial completion or execution of such plan

of composition occurred before or after the filing of said petition, shall not be construed as limiting or prohibiting the effect of this Act, and the written consent of the holders of any securities outstanding as the result of any such partial completion or execution of any plan of composition shall be included as consenting creditors to such plan of composition in determining the percentage of securities affected by such plan of composition.

INTEREST OF THE UNITED STATES

The United States was granted leave to intervene, pursuant to the Act of August 24, 1937, c. 754, 50 Stat. 751 (28 U. S. C. Sec. 401), to uphold the constitutionality of the Act of June 22, 1938, c. 575, Sec. 3 (b), 52 Stat. 940, Section 83 (j) of the Bankruptcy Act (11 U. S. C., Supp. V, Sec. 403 (j)). This brief is accordingly limited to a discussion of the constitutional questions involved.

STATEMENT

On January 28, 1939, the City of Sanford, Florida, filed a petition for the confirmation of a "plan of composition" of its debts pursuant to Sections 81-84 of the Bankruptcy Act, 11 U. S. C., Supp. V, Secs. 401-404 (R. 1-83, 83-84). The petition set forth the financial status of the city and alleged that on February 1, 1937, it adopted a plan for the composition and adjustment of its indebtedness by the issuance of refunding bonds in exchange for outstanding bonds of the city (R. 2-7). The petition averred

that 87% of the bondholders had accepted the refunding bonds in exchange for the old bonds (R. 2), and that the plan had been accepted by not less than 51% in amount of the securities affected (R. 16, 83-84). The petition recited that the city was in default in the payment of principal and interest on its bonded indebtedness and was unable to pay its debts as they matured (R. 12-15) and that it was then insolvent (R. 7, 16). The district court approved the filing of the petition, appointed a Special Master to receive and file claims, and set a time for a hearing on the petition and answers and objections filed thereto (R. 85-86).

Answers and objections to the plan and a motion to dismiss were filed by various creditors, including petitioner (R. 93-109, 109-122, 123-128). In its answer, petitioner alleged that the creditors consenting to the plan consisted almost wholly of those who had accepted refunding bonds, that the acceptance of such bonds was irrevocable and not conditioned on the acceptance of or on the power to bind the others, and that if Section 83 (j) were construed to authorize inclusion of the consents of holders of refunding bonds in the 51% required for the filing of a petition, and in the $66\frac{2}{3}\%$ required for confirmation of the plan, it was in violation of the Fifth Amendment (R. 110). On the day set for the hearing, the district court, being of the opinion that constitutional and legal issues had been raised (R. 131), referred the case to a Special Master to

report to the court upon the "preliminary questions of law raised by the pleadings" (R. 131).

The Special Master found Section 83 (j) constitutional (R. 135-137), to which finding exceptions and objections were filed (R. 137-138, 139-140, 141-144). The objecting creditors also moved for an order preserving their exceptions for a future hearing and for a rereference to the Special Master to take testimony. It was also suggested that the Attorney General be notified that the constitutionality of Section 83 (j) had been drawn in question (R. 144-147). The district court ordered the exceptions to be reserved, denied the motion for a rereference, and ordered that the Attorney General be notified (R. 148-149). The motion of the United States for leave to intervene (R. 149-151) was granted (R. 151-152), and the United States thereupon filed a petition of intervention supporting the constitutionality of the statute (R. 152-153). The report of the Special Master was affirmed and all exceptions thereto denied (R. 153-154).

Upon appeal, the Circuit Court of Appeals affirmed the orders (R. 164-170). The court concluded that Section 83 (j), both by reason of its plain language and its legislative history (see Appendix, *infra*), authorized the inclusion of the holders of the refunding bonds among the consenting creditors, and that, as thus applied, it did not violate the Fifth Amendment (R. 168).

ARGUMENT

Petitioner's contention that Section 83 (j) as here applied violates the Fifth Amendment is premised upon its claim that an identity of interest between itself and the majority bondholders does not exist in view of the settlement under which the majority accepted the refunding bonds. Hence, it argues, the refunding bondholders cannot constitutionally be authorized to express consent to the plan of composition on behalf of all bondholders even though the plan, concededly, would be valid in the event the interests of all the bondholders had remained identical.¹

1. The fundamental premise of petitioner's argument simply ignores the fact that, at the time the present holders of the refunding bonds consented to the plan and exchanged the old securities for the new, they were in precisely the same position as the petitioner. Their acceptance of the refunding bonds is, therefore, a warranty of the fairness of the plan as applied to all bondholders, including the petitioner.

¹ A necessary assumption in petitioner's line of argument is that the consent of a majority of creditors is necessary to the constitutional validity of a plan of composition. The court below did not expressly consider whether such consent is required. While the question does not arise here, in view of the numerous other defects in petitioner's argument, the Government does not concede that the Congress cannot constitutionally legislate on "the subject of bankruptcies" without making provision for majority consent in this class of case. See *United States v. Bekins*, 304 U. S. 27, 47.

2. It may be that the city is better able to pay the petitioner and the other dissenting bondholders by reason of the reduction in its indebtedness resulting from the settlement under which the majority accepted the refunding bonds. But their claimed advantage, we submit, is in no sense an interest of the type protected by the Fifth Amendment.

(a) Petitioner does not, and indeed cannot, question the fact that the settlement could have been made conditional upon the acceptance of the plan by all the creditors or upon an adjudication binding all the creditors in a composition proceeding; in either event, concededly, the settlement would not bar the right of the refunding bondholders to consent to the composition plan. The insubstantial character of the interest claimed by petitioner is also underscored by its failure to show that the city could not validly deprive the petitioner of all advantage from the settlement by issuing new bonds for municipal improvements.

It may be observed, moreover, that nothing in the Fifth Amendment would prevent the refunding bondholders and the city from voluntarily rescinding even a binding settlement, and thus restoring the *status quo*. Petitioner was neither a party nor an intended beneficiary of the settlement; it can scarcely urge that it has a vested right in the continuance of the incidental advantage thus conferred upon it. Compare *Edward Hines Trustees v.*

United States, 263 U. S. 143, 148; *Sprunt & Son v. United States*, 281 U. S. 249, 256-257.

(b) Petitioner's contention (Pet. 12-13), that under the local law of Florida the settlement is binding and cannot be rescinded by the parties, even if true, aids it not at all. It nowhere suggests that the Fifth Amendment precludes the State of Florida from authorizing the majority bondholders to rescind the agreement. Hence, its position in this respect may reasonably be compared with that of the shippers in the *Hines* and *Sprunt* cases, *supra*, who were denied the right to contest the validity of orders of the Interstate Commerce Commission modifying rates and practices of carriers (with respect to other shippers) from which complainants incidentally had derived a competitive advantage.

3. Even if it were to be assumed that the incidental advantage accruing to petitioner from the settlement is an interest of the type protected by the Fifth Amendment, the conclusion is clear that Section 83 (j) as applied is constitutional.

There is no question but that the consents of the majority, given at the time the refunding agreements were executed, could validly have bound petitioner under a composition agreement, identical with that here confirmed, had the Municipal Bankruptcy Act then been in existence. Petitioner's real objection, therefore, is that Section 83 (j) makes these same consents binding retroactively.

Yet the fact is evident that petitioner could not have avoided the operation of the Act even if put on notice of its existence; it is equally manifest that petitioner took no detrimental action in reliance on the absence of the Act. In these circumstances, surely, there is no ground for urging that the retroactive validation of the consents is not constitutional. Compare *Welch v. Henry*, 305 U. S. 134, 147-148. The constitutionality of thus validating the consents, by enacting Section 83 (j), is especially assured by reason of the timeliness of Congress' action.² Compare *Welch v. Henry*, *supra*, at 148; *Dunbar v. Boston & Providence R. R.*, 181 Mass. 383, 386 (per Holmes, C. J.).

² The case of *Ashton v. Cameron County Dist.*, 298 U. S. 513, holding the first statute unconstitutional, was decided on May 25, 1936. The present act was passed during the next session of Congress on August 16, 1937, but, in view of the *Ashton* case, could hardly have been considered a reliable instrument for the reduction of municipal indebtedness until this Court's decision in *United States v. Bekins*, 304 U. S. 27, decided on April 25, 1938. Meanwhile, on April 14, 1938, the Circuit Court of Appeals for the Fifth Circuit handed down its decision in *In re City of West Palm Beach, Florida*, 96 F. (2d) 85, concluding that the holders of refunding bonds previously exchanged for their old securities could not be included as consenting creditors under the then-existing provisions of the statute. Accordingly, on June 22, 1938, the Congress enacted the amendment here in controversy, Section 83 (j), to remove the difficulty created by the *West Palm Beach* case. See Appendix, *infra*. In the circumstances, it can hardly be suggested that the Congress should have acted more expeditiously.

CONCLUSION

The decision of the court below is correct. There is no conflict of decisions. The petition for certiorari should, therefore, be denied.

Respectfully submitted.

FRANCIS BIDDLE,

Solicitor General.

FRANCIS M. SHEA,

Assistant Attorney General.

MELVIN H. SIEGEL,

Special Assistant to the Attorney General.

ELLIS LYONS,

EDWIN E. HUDDLESON, Jr.,

Attorneys.

SEPTEMBER 1940.

